

No. 21926

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

HAROLD ALMUS LANGDON,

Appellant,

vs.

RICHARD D. JACKSON, E. M. OWENS, JOHN A. TIDY-
MAN,

Appellees.

APPELLEE'S REPLY BRIEF.

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FILED

OCT 6 1967

WM. B. LUCK, CLERK

OCT 11 1967

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APPELLEE'S REPLY BRIEF.

Statement of the Case.

Appellant invoking Title 42 U.S.C.A., Section 1983 and Title 28, U.S.C.A., Sections 1343(3) and (4) of the Civil Rights Acts brought this action against three police officers of the City of Los Angeles, Officers John A. Tidyman, Richard D. Jackson and E. M. Owens.

The action, filed May 10, 1966, alleges in substance that on an unenumerated day in March, 1958, and again on March 23, 1958, police officers without probable cause or pursuant to a search warrant entered Plaintiff's apartment and unlawfully seized specified personal property of Plaintiff.

In response to Plaintiff's Complaint, Appellees filed a Motion to Dismiss upon the grounds: (1) that the

Complaint fails to state a claim upon which relief may be granted; and (2) the action should be dismissed at this time for the reason that said suit can be brought in a more favorable atmosphere by the Plaintiff after he has been released from a state prison.

The Motion came on regularly for hearing before the Honorable Leon R. Yankwich, United States District Judge, on March 13, 1967. The Court thereafter ordered the action dismissed on March 16, 1967, and such order was entered in the docket the same day. Thereafter, Plaintiff appealed to this Court.

Questions Presented.

- (1) Whether the allegations contained in the Complaint show upon its face that the action is barred by the statute of limitations.
- (2) Whether Appellant's status as prisoner sentenced to life imprisonment without possibility of parole is such a disability or status that tolls the applicable statute of limitations.
- (3) Whether Appellees can raise upon appeal the defense of the statute of limitations where the District Court dismissed the action on the grounds set forth in the motion of Appellees.

ARGUMENT.

Summary of Argument.

The Complaint on its face shows that the three year statute of limitations contained in Section 338(1), Code of Civil Procedure, bars the within action. Appellant's disability, sentenced to death and thereafter on October 8, 1959 commutation of sentence to life imprisonment without possibility of parole, does not toll Section 338-(1), Code of Civil Procedure. This Court can upon appeal from a motion to dismiss for failure to state a claim pursuant to Section 12(b)(6) of the Federal Rules of Civil Procedure review the Complaint before the District Court and affirm dismissal on the grounds the within action is barred by the statute of limitations.

I.

The Complaint on Its Face Is Barred by Section 338(1), Code of Civil Procedure.

The cases are clear that the statute of limitations may be raised by a motion to dismiss for failure to state a claim upon which relief may be granted. (*J. M. Blythe Motor Lines Corp. v. Jean Blalock*, 310 F. 2d 77 (1962).) The applicable statute of limitations involved in an action brought pursuant to Title 42, U.S.C.A., Section 1983, is Section 338(1), Code of Civil Procedure (*Smith v. Cremins*, 308 F. 2d 187).

The Complaint alleges an unreasonable search and seizure of Plaintiff's apartment and property during the month of March in the year 1958. The action was filed May 10, 1966, and is therefore barred by Section 338(1), Code of Civil Procedure.

II.

Appellant's Status, a Prisoner Sentenced to Life Imprisonment Without Possibility of Parole, Does Not Toll Section 338(1), Code of Civil Procedure, and the Action Is Therefore Barred by Reason of Said Section.

Part of Appellant's argument in opposition to Appellees' Motion to Dismiss in the lower Court was based upon the asserted inapplicability of Section 352, Code of Civil Procedure, because of his sentence to state prison for life without possibility of parole. He therefore states that the tolling provision contained in this section was and is inapplicable to his cause of action herein.

It is settled law that Appellant's status as a prisoner does not prevent him from bringing his action under 42 U.S.C.A., Section 1983 in Federal Court. This Court in *Weller v. Dickson*, 314 F. 2d 598, at 601, held that not only does a prisoner have the capacity to bring such an action but also has the *right* to pursue his action in Federal Court.

It follows therefore that Appellant's status as a prisoner does not toll the three year statute of limitations applicable to his cause of action.

III.

Appellees Can Raise on Appeal the Statute of Limitations Where the Motion to Dismiss in the Lower Court Was Upon the Ground That There Was a Failure to State a Claim Upon Which Relief Could Be Granted.

It is an established rule of law that where a Complaint shows upon its face that an action has not been brought within the designated statutory period, such an issue may be raised upon a motion to dismiss (*Rohner v. Union Pacific Railroad Co.*, 225 F. 2d 272). There is also case law to the effect that a reviewing Court will review the entire record before the lower Court and if the decision of such lower Court was based upon the wrong ground or a wrong reason, the reviewing Court will affirm if the result of such decision was correct. (*Lum Wan v. Esperdy*, 321 F. 2d 123). The Federal Court also has held that on appeal from a motion to dismiss pursuant to Section 12(b)(6) of the Federal Rules of Civil Procedure that the Appellate Court can affirm the order of dismissal even though the defense giving rise to such dismissal is asserted for the first time on appeal. (*Southard v. Southard*, 305 F. 2d 730, at 732).

The above cases constitute ample authority for affirmance of the trial court's decision to dismiss the within action. Appellees' motion was under Section 12(b)(6). The Complaint, filed May 10, 1966 and Appellant's sentence having been commuted on October of 1959, was filed more than three and one half years after the statute of limitation period had expired.

Conclusion.

The Judgment of the trial court dismissing Appellant's action against Appellees, John A. Tidyman, Richard Jackson and E. M. Owens, should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN T. NEVILLE

